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THE VOCATION OF AMERICA FOR THE SCIENCE OF ROMAN LAW.[1]

I

WHEN a German professor of Roman law discusses his subject in America in an attempt to further a *rapprochement* of the jurisprudence of this country and that of his native land he may well be in doubt whether this can be achieved. At first sight, an immense chasm seems to yawn between the legal ideas of the United States and of its juristic mother country, England, on the one side, and the romanized legal ideas of continental Europe on the other side, so that from a juristic point of view the Channel seems broader than the ocean. True, the common law of England and of North America, even in its period of development in England, did not remain unaffected by Roman law; but this influence never had the same force in England and America that it had on the continent of Europe, especially in Germany. Recently, I concede, this state of things appears to have changed. In Germany, especially, the compilation of law made by Justinian lost its force as a statute book on the first of January, 1900, so that now, with some unimportant exceptions, it has no more binding force for German tribunals than it has always had in

[1] The first part of the following article is similar in substance to the introductory lecture delivered by Professor Leonhard, when Kaiser Wilhelm Professor of Roman Law at Columbia University in 1907–1908.

American administration of justice. In spite of this, the legal situation of the two countries has by no means become the same by this change. A new difference grew up in that Germany has now a civil code, the contents of which were shaped to a great extent by the doctrines of the science of Roman law. Therefore German lawyers feel obliged to look at Roman law from a special point of view in order to explain their code with the aid of its Roman sources. On the contrary, America has no such code, with the exception of the code of Louisiana; nor do American lawyers require such a point of view to explain their law. In consequence, one might argue that at present the opportunities for collaboration of the two countries in expounding Roman texts have decreased rather than increased.

In spite of this, I venture to assert that the Roman texts remain an important bond between America and Germany. Whether you accept such an assertion depends wholly upon the view taken as to the connection between law and national character. This relation is often overrated by the opponents of the study of Roman law and is often over-emphasized; not, indeed, without noteworthy consequences.

Above all it must not be overlooked that there are two distinct purposes with which the study of Roman law may be pursued. The one is to study critically models of the best application of legal rules. The other is to enable us better to understand the present-day law so far as it is influenced by Roman texts.

All decisions which have corresponded to the needs of their time are to be regarded as models of juristic technique; that is, as models of the art of applying the law. It is indifferent whether the legal system built up by them still obtains or whether we approve it. The so-called classical Roman law, which was brutal toward prisoners, slaves, and gladiators, trifling in matters of concubinage, indecent in its rewards for begetting children, and harsh to the poor, perhaps does not meet the approval of a just critic holding the modern point of view. Nevertheless the jurists who applied this legal system were classical; that is, they were technicians of the first rank in the art of administering a given law. We do not study their art to enable us to imitate their conceptions of law, but only to enable us to apply them in the administration of wholly different rules. It was not the Roman law which was classical, but the Roman lawyers.

It is obvious that American jurists have learned and can yet learn much from Roman models, even as the Germans have done. One may venture to say that the situation in England and America in this respect is more favorable than in Germany, because in common-law countries the Roman codes have never had the force of statutes, and therefore the Roman principles of law may be more easily separated from the art of the lawyers who applied them. In Germany the two things have often been confused, and the admiration rightly due the art of Roman lawyers has unjustly been given to the rules of law, which were only the materials shaped by their art. By way of reaction men went to the other extreme. The overrating of Roman texts gave way to an underrating and a neglect of the fundamental principles of the modern European science of law. It is true that a general theory of method and models thereof may be found elsewhere as well as among the Romans; but among the Romans to a greater extent. The art of profiting by them is no more important for Germany than for America. Therefore it is a mission of every nation to grasp the historical facts necessary for an understanding of the Roman models.

Whether the content of Roman law has a permanent value for America or for Germany is a distinct question, although it is often confused with the foregoing. Opinions differ widely on this point. There are two important general theories. The one is that legal rules or at least legal relations have a cosmopolitan nature; the other teaches that all rules, conceptions, and relations of law have a national character. The first opinion formerly prevailed and was overthrown by the so-called historical school. It was overthrown but not destroyed, for to-day the majority of jurists are hesitating between the two.

The followers of the cosmopolitan theory fall into two main groups: a group of Romanists, and a group of philosophers who intentionally reject the principles of the historical school. The cosmopolitan-Romanist theory teaches that there are certain rules and conceptions of law of general validity which are to be found in every country and at every time, and that by some chance the Roman lawyers had more opportunity than those of other nations to discover these general rules and set them down for all times to come in the form of the so-called "*ratio scripta.*" This opinion

is not without a certain foundation. It is undoubtedly true of the technical art of jurisprudence, which often has been confused with the rules and the conceptions of law; and it is also true of certain tendencies common to the different legal systems by which universal human interests are protected. Nevertheless this theory neglects the political differences between nations. Therefore whoever attempts to propagate the German-Romanist teachings in America falls at once under suspicion of adhering to this cosmopolitan theory, of attributing to Roman law the character of an immutable written reason (*ratio scripta*) which it cannot claim.

I must with emphasis protest against this suspicion. Whoever with the practical sense for which English and Americans are especially noted considers the conditions of law in all places and in all times must absolutely dispute their identity. We find, it is true, claims to security which are reiterated almost universally; we find also similar means of securing them at different times and in different places. But the manner in which those who administer the law must appraise these means for satisfying the needs of a people and the extent to which they are employed are everywhere more or less different. There is no unitary reason of law. Therefore there can be no *ratio scripta* of all law. And the non-existent even the Romans could not call into being. He who seeks this pursues a will-o'-the-wisp. The fantastic undertaking to derive such impossible results from the study of Roman legal history, which many have essayed in Germany, cannot be recommended to America. From this point of view the content of Roman law has no value for explaining the legal doctrines of America.

For the philosophical group of cosmopolitan jurists Roman law has even less value, since they would develop universal rules and conceptions of law from the events of life without reference to the past, as the mathematician evolves his theories.

This theory is held by the adherents of the so-called school of equitable interpretation (*Freirechtsschule*). In accordance with this view German and American jurists should strive to achieve a common goal, as, for example, German and American mathematicians do. This goal would be a general theory of law of world-wide validity. Certainly such a theory as this has no relation to Roman law. On the contrary every nation could develop the universally valid law without resort to foreign models. It may

be, indeed, that the followers of such a method would gain some general ideas useful for their purpose from the Roman texts. And since for centuries Germans have devoted a special measure of labor to exposition of the Roman texts, so far as a general, super-national theory of law is to be found in the Roman texts you may well turn to Germany for knowledge thereof. I shall not deny that a general theory of law for all nations may be developed. It must be conceded that there are certain fundamental forms of law which frequently recur even if there is no common content of the legal system for the whole world. Especially there are certain modes of development of law, certain ideas as to the function of judges, and certain qualities of law, which can be found everywhere. But the most important observations of this kind were not made by the Roman lawyers. They are making nowadays more under the influence of modern philosophy [2] than through the interpretation of the Roman texts. The Roman texts afford but scanty materials on these points.

The result is that from the point of view of cosmopolitan jurisprudence there is little advantage for America in the Roman legal science of Germany.

There are two things especially overlooked by the writers who in place of historical study of law would cultivate a sociological observation of the present. In the first place, the so-called present is nothing more than the last period of a continuous history. Secondly, no sociology can neglect the mightiest of social forces which exist in the traditions and the ideas developed in the past. Before the name " sociology " came into use, there existed for centuries unconscious sociologists, namely, the scholars who treated and applied the history of law.

Let us turn now from the cosmopolitan to the nationalist theory of law which gives to the law before all things a national color. The historical school derived law from the "spirit of a people" (*Volksgeist*). Therefore it has often been taught that in reason no nation can construct its law upon the ideas of another. From this point of view not only the German law, but even the Roman law, must be excluded from the interest of American lawyers. Accordingly it was a tremendous mistake that Germany meddled

[2] *Cf.* especially Stammler, Theorie der Rechtswissenschaft.

so much with Roman law. This opinion may be heard and read often in Germany to-day. On this theory one would have to say, "America for Americans, not for Romans."

This would be well taken if the relation between the United States and the Roman empire were the same, for instance, as the relation between the United States and China or the United States and Turkey, that is to say, if ancient Rome were indeed an alien country to America from an intellectual point of view. Geographically the Roman people are aliens. Anthropologically there is a different race in Italy than the prevailing races in America. Even with respect to language there is a fundamental difference. But if we look at these two peoples, the Romans and the Americans, with respect to their culture, as representatives of their special civilizations, as individualities in a greater family of human culture, this is not true. This quality of civilization is an essential one for our problem as to the interest of America in Roman law. Relation of blood and descent cannot decide this question, because law is a matter of ideas and of spiritual life, not of physical substance. The gap which yawns between this physical substance and the content of human souls is nowadays often underrated, since we are wont to regard the human mind in altogether too scientific a manner, as a mere complex of functions of the body. Thus regarded, relation of blood seems to be more important for human institutions than identity of thoughts and sentiments. It is not strange, therefore, that with respect to study of the law many scholars would set up an exclusiveness of the Teutonic races as against the rest of the world, since there is a closer connection between the English, the American, and the German peoples, than between either of them and any other. Thus they might be set off as a perfectly defined family. But that is wholly without importance for the domain of law.

As has been mentioned already, the legal tradition of the different nations on the European continent for centuries has had a closer connection with Justinian's law books than has been the case in England or America. Therefore in the larger circle of European culture, to which America also belongs and to which Japan seeks admission, we see two great groups: first, a group strongly influenced by Roman law; and, second, a group less influenced in this way. England and America are in the latter class. Formerly the

opinion prevailed in Germany that the English law was wholly free from Roman ideas. Everyone knows from the excellent works of Sir Frederick Pollock and Professor Maitland that this opinion was long ago refuted. In reality Roman law was received in both groups. But in England this reception was more a reception of ideas, in Germany more a reception of a code. In the former there was a reception only of doctrines or terminologies, on the Continent there was a reception of the totality of the Roman texts. Although they could not be introduced into the jurisdiction without many exceptions, they were introduced into the body of German law as a whole because otherwise they could not be understood. Roman ideas of law invade the whole wide territory for which the Christian church created a common civilization. The great European circle of culture by no means includes the whole of humanity, but it stands as a mighty power between humanity and the single peoples which compose it. Therefore we must not ask whether the character of our law shall be cosmopolitan or national. For there is still a third possibility: it may be European. This does not refer to geographical Europe, but to a community which, developed first in Europe, has acquired a larger territory, overpassing Europe's boundaries and extending throughout the world.

This greater Europe is composed of all nations which depend upon a common intellectual past. From Rome arose the universal empire of antiquity. From that empire arose the universal church of the Middle Ages. From that church arose the invisible commonwealth of civilized nations. This community is not one of law alone, for law never remains uninfluenced by the other branches of culture. But the members of this family of nations are related in the first degree with respect to ideas of law, because, first through the influence of the universal church, and later through the international science of Bologna, Roman and canon law came to be a common fundamental basis of law for the community of civilized peoples. In later times nations have become more and more separated, but the remembrance of the common source of their thinking has kept them from absolute division. Without that a reunion of them through the international intercourse of to-day could scarcely be deemed possible.

In this way certain Roman ideas have been preserved as a com-

mon treasure of law which can be easily recognized by the terminology of juridical science. It was of this common world of thoughts which Savigny spoke when writing of the Roman law of to-day under the title, *Das heutige römische Recht.* He meant thereby fundamental legal ideas of the circle of civilization of greater Europe which it has inherited from antiquity. This may not be said as yet of the whole world, although it almost seems as if the individuality of this favored group would gradually absorb all humanity. If this could happen, the law would become an actual cosmopolitan possession. Until this happens it is and remains national, although not without a mingling of elements belonging to greater Europe. In consequence, the law of each people within this family of nations is a composite of common and of peculiarly national elements.

This is true for America no less than for Germany. For the United States especially is fully conscious of the European character of its culture. It does not refuse its citizenship to the children of Africa; but it does not admit with them any institution which has not a European character — as, for instance, polygamy or human sacrifice. Naturally America also possesses its individual national character and its individual legal institutions; but melted and mingled therein to a very high degree is the world of ideas which is common to European culture, not merely the narrower world of the Anglo-American common law.

If you look at the mixture of national and European ideas, which is to be seen in the different nations, you will find a great difference in the relation between the two elements of law which are mingled therein. As has been said above, the Anglo-American community gave no excessive regard to the traditional Roman material, since it shut itself off in large measure from the general spiritual movement in Europe which was especially influenced by Roman law. On the contrary, for those parts of law which have arisen from modern world-commerce, not from antiquity, especially commercial law, general European ideas have been cultivated by the English race in a very high degree. There is, then, a mixture of three elements in law as in other phenomena of civilization:

(1) Common ideas of Roman and ecclesiastical origin.

(2) Ideas peculiarly national.

(3) Modern common ideas, developed neither by antiquity nor

by single nations, but by the commerce of later times and the connection of scientific life.

To-day the law which may be called "super-national" is by no means purely Roman. A large part has nothing to do with Rome. But the development of our common institutions had its very root in the common ideas of Roman science, which were already spread among civilized nations when this development began.

One must admit that the attitude of Germany toward these ancient foundations of law has changed greatly. Formerly the wisdom of antiquity was admired with an almost slavish devotion and allegiance. Nowadays there are those who go to the opposite extreme. There are moderns who would banish the Roman texts from the materials of juristic education, even as some reformers would exclude the Old Testament from the study of Christian doctrine. Not very long ago the cultivation of Roman law in Germany seemed to be a standard for the world. Germany has rapidly lost this hegemony, since many of her scholars, certainly not working for the best end of their country, have tended to overrate the national element at the expense of the common ideas of European law.

Such a change was the consequence of new purposes, given to Germany by new events, especially by the rise of the German Empire. They have been carried out not unsuccessfully, and they could not have been attained without a strong consciousness of strength and of nationality. But we must hope that the glorious past when Germany led other peoples by developing the common European ideas of civilization will not be forgotten.

We hear on all sides the voices of Romanists who lament that Germany studies only the old Roman and old German law, and that she is beginning to forget the law of the last part of the nineteenth century from which sprang the new code. It is to be feared that the faculty for understanding our own code is beginning to disappear. Demand is made with reason that we restore the science of working over Roman ideas in post-Roman times.[3]

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[3] *Cf.* Leopold Wenger, Das römische Recht an den deutschen Universitäten. Paris, Rousseau, 1912 (Mélanges Girard).

This doctrine went wrongly by the name of *Pandekten*. The name was absolutely unsuitable and therefore cannot be recommended for use in America. Formerly a short introduction to Roman law was succeeded by a detailed exposition. The

But if we should restore in Germany the old science of modern Roman law, this task would have no interest for America. For both the name (*Pandekten*) and the thing itself are foreign to you. In Germany, we need a statement of Roman law adapted to the civil code, such as Sohm has already supplied in the newer editions of his excellent textbook (*Institutionen*), the earlier editions of which were translated into English and had a wide circulation in America. But this new form of the elements of Roman law can be of very little interest abroad.

On the whole the theory of Savigny and his successors and the German learning of the Pandects was not put in complete relation with the whole law of the European culture-community. They knew but little of English law, and they knew still less of the influence of Roman law in England. The famous German doctrine of the Pandects was not a European learning, it was only continental.

Nevertheless, there are English and American lawyers who know very well how to use German Pandects even for American purposes. Chief among them is Justice Oliver Wendell Holmes.[4] But I do not believe that such a difficult task can be undertaken by every one, nor that the regular courses for American practitioners should be burdened by the study of German pandectists, who unhappily are beginning to be neglected even by their compatriots because of the difficulty of fully understanding them. When even in Germany a thorough revision of their works, already falling into neglect, is obviously needed, how could I ask Americans to build a common science of Roman law for both countries upon those impaired foundations?

Such a science must be reserved for the few who are distinguished by extraordinary faculties and extraordinary knowledge. This is the more true since the United States went a different way than Germany from the beginning. At first it was conscious of its

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introduction followed Justinian's Pandects. In later times the introduction dealt with the pure Roman law of antiquity and the exposition with the modern Roman law. Lectures on each were divorced from the Roman texts. But in spite of this the old names have remained without any good reason. Indeed, names frequently rest on usage rather than on reason.

The same name is used in France for an absolutely different thing. *Cf.* P. F. Girard, Mélanges de Droit Romain, p. 467 ff. Indeed, the French use of this word is also arbitrary.

[4] The Common Law, Boston, 1881.

distinction from Europe and felt that its nature was opposed to European peculiarities. But since it has become a great world-power coming into close contact with all European commonwealths and fusing the English element and the other races into one mass, New England has become a New Europe. It is easy to understand, therefore, why the tendency should exist to cultivate the common sources of European civilization following similar purposes on the continent of Europe. The astonishing progress which interest in Roman law has made in America in a very short time, while the subject was coming to be neglected in Germany, is a remarkable phenomenon in the history of civilization. If the movement continues in the same direction in both countries, it may be that in the future America may acquire the leading part in the European science of law which Germany played until recently. Such a result, however, cannot yet be expected, because American law has not the necessary traditions, and Germany, I hope, will regain a better memory of its past before it becomes overburdened with new tasks. Yet one may anticipate that a collaboration of the two nations will come from a sound comprehension of a common interest in study of the same subject. Such a collaboration would require the German Romanists to treat the practical Roman law from another point of view than the one now usual. To-day, since the enactment of the new civil code, a merely historical and philological treatment of Roman law prevails. The "pure Roman law" (*i. e.*, pure in contrast with applied) unadulterated by the ideas of later times seems to be regarded as the true ideal of scientific endeavor; namely, an exposition freed in every respect from the present, and nothing more than a phase of philology and archæology. This tendency has given us excellent works of general value. But the relations of our present law to the Roman law are, more and more, intentionally overlooked or passed over in silence. There is indeed a difference between a pure science and an applied one. The former so-called "science of the Pandects" was of the latter type, as we have seen above. More and more it is losing its practical value for us. Nor can it regain its former glory unless its principal ideas are converted into a common science for the whole civilized world, and no longer confined to the special interests of Germany. Our program must be: To make manifest the value which is to be attributed to Roman texts as a common source of

European civilization, as a source of the internal unity of legal institutions of the greater-European family of peoples.

Such a purpose has a special value beyond exposition of the German civil code by romanist theories of the past. To achieve it, America and Germany have a common mission. In preparation therefor, Germany offers a rich and abundant material from the days of the science of the Pandects. For the pandectists, although neglected nowadays, have not permanently lost their universal value. But America would have a certain advantage in the many-sidedness that results from the coming together of so many different nations of European civilization, and the consequent need of emphasizing those ideas of law and sentiments of right which are common to them all. Moreover, the study of Roman law promises to develop new forces. No doubt it was hard that for centuries Germany should base her jurisprudence upon a body of law written in a foreign tongue and ill-arranged. But this much-abused situation, along with indisputable disadvantages, involved extraordinary advantages, which the adversaries of Roman law are wont to ignore. These difficulties required and in turn exercised mental powers, which would not have been necessary for the understanding of a simple national development of law in the country in question, if such a development had existed. An enormous quantity of historical and philological knowledge, with which a judge working under simple conditions can easily dispense, was imperatively demanded in Germany of every lawyer, from the highest functionary to the lowest. By this circumstance the whole social class of lawyers was elevated above the general unlearned mass. But above all, the ill-arranged compilation of Justinian forced the professor of law to work out a useful systematic form, which has been the quest of centuries. Without this the ambiguities of the Roman books could never have been cleared up, nor the books purged of internal contradictions. There are many who believe that the fundamental ideas of legal systems have been given to mankind by nature or by the grace of God, like the rules of mathematics. In reality they have been won in a hard struggle against a confused mass composed of conflicting human thoughts. In England there was not so hard a struggle, because there was no necessity of handling Justinian's code as a domestic statute. But in return continental science, by arranging the Roman texts,

wrought valuable categories, of which England's jurisprudence also is making fruitful use, and will do so even more, I take it, in the future. From these categories the systems have been constructed without which the continental civil codes would not exist. Finally the lawyers of continental Europe were always obliged to work backward from the present to the past to find the means of performing their office, and in consequence were continually forced to make a comparison which in Germany is usually called "intertemporal." In this way they gained the art of surveying centuries in a bird's-eye view.

Translation of such results of continental jurisprudence into the sphere of English and American lawyers, which has been done already by many excellent minds, makes for the juridical *rapprochement* of the nations of the greater European family. From such a *rapprochement* proceeds the tendency towards a law of the world,[5] at least towards a science of law to be cultivated by the world.[6] In the endeavor to bring about such a *rapprochement* of legal science we must compare not merely the rules of law in different countries, but the whole legal development in one with the whole legal development in another. Only in this way can we discover and establish the extent of the common influence of Roman ideas on Europe and on America. This is a matter of so great importance that it is worth while to state even more exactly the method which seems to be necessary in the treatment of applied Roman law in America.

Three comparisons of law must be made, two of them "intertemporal," *i. e.* for different periods, and a third international, for the same period, *i. e.* the present. The first step would be to investigate the influence of the Roman texts on the law of continental Europe, especially Germany. Next the influence of these same texts in England and America would be considered. As a third step the results of both comparisons would be compared in order to develop the connections and the contrasts between the two groups

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[5] *Cf.* Zitelmann, Die Möglichkeit eines Weltrechts, Wien; R. Leonhard in den Studien z. Erl. des bürgerl. Rechts, 17 Heft, Breslau; M. & H. Marcus, 1906, p. iii (über die Wiederverebung des Geistes der alten Pandektenlehre); Munroe Smith, Jurisprudence, N. Y., Columbia University Press (1908), p. 40: "The great problem of the future — that of establishing a world order".

[6] *Cf.* Reichsgerichtsrat Hagens in Deutscher Juristenzeitung, 1912, p. 1418.

of European law. Only in this way may we unfold and make manifest the unifying power which the vanished Roman universal empire still wields in the law.[7]

II.

With this purpose I expounded Justinian's Institutes in New York, selecting this work as a foundation for such lectures, because it was written before the development of German science and gives a faithful picture of the old Roman ideas, whereas the German textbooks of Roman law are written in the system of a later jurisprudence which adulterates by the thoughts of later periods a pure impression of the world of Roman ideas.

As it would not be worth while now to publish the whole text of these lectures, designed for beginners of the study of Roman law, I shall only repeat the point of view from which, in my opinion, the rising juridical science in Europe, which treats of the valuable traditions of antiquity, must be regarded. To this I shall add a brief exposition of the general doctrines contained in Justinian's Institutes.

But first let me set forth some general views concerning the character of the Roman influence on the present European and American law.

The codes of Justinian are the result of a development which went through three periods. The first was the old national Roman law, the second was the law of the stage in which the Roman commonwealth ruled a number of other commonwealths, the third was the period of the united world-empire founded at Byzantium, in which the formerly distinct commonwealths were centralized into a new one.

Involuntarily one compares this series of periods with the development of the American nation in the United States. At first there was a settlement of Englishmen. Later we see an alliance of commonwealths of a different character, in which the older English elements prevailed. At last there is a strong tendency on the part of the elements which came later to melt down all differences

[7] *Cf.* Munroe Smith, Jurisprudence, p. 39: "New also — an invention of our time — is the combination of the historical with the comparative method; and the results in every field of social science have been surprisingly rich."

into a new mass which will be rather a New Europe than a New England.

But let us return to Roman history. The oldest period in Rome was distinguished by a thorough separation of private life from the public power of the kings and their successors, and by joining such an independence of citizens with the strongest force of public authority; whereas with other peoples either the individual liberty or the concentration of authority was wanting, or did not fully develop. This old Roman idea of protecting private life without public interference in the exercise of ownership became the foundation of law for all European peoples. But it is deprecated and attacked by the socialists and by the anarchists, because socialists disapprove private ownership and anarchists disapprove public power. Both parties instinctively regard Roman law as their natural enemy.

The second Roman period, in which Rome was the leader of the civilized world, was the source of the modern system of trade and commerce. The book of the mysterious "Gaius," of which Justinian's Institutes are a copy, was written in this period. This book (*institutionum commentarii quatuor*) is chiefly a treatise on the modes of acquiring substance (*de modis adquirendi*).[8]

The main principle of this system of different forms of acquisition was the idea of unrestrained competition. This idea also has many opponents. But none the less it rules the commerce of most nations and especially of America and Germany, where without doubt it has greatly increased the national wealth.

After these two periods, namely, the stage of evolution of independent private life and the stage of free competition in commerce, followed the third or Byzantine period, the stage of centralization and unification, characterized by the securing of legal protection through a central public authority. This period also represents a gain in human culture. The consequence of this period, namely, unity of the commonwealth, is to be found not only in the despotism of Byzantium, but also in later republican organizations, which above all need internal unity, and is especially noticeable in the United States, which takes just pride in its Supreme Court.

These three principal results of Roman history—independence

[8] *Cf.* R. Leonhard, Institutionen, Leipzig, 1894, p. 246.

of private life, competition in commerce, and unity of jurisdiction — existed on English soil in the Roman province of Britain before the immigration of the German tribes. No conqueror has attacked them, although other traces of Roman culture were destroyed. Their foundations stood unshaken through centuries, even in the feudal period. These principles crossed the ocean with the English and Dutch immigrants, and we have yet to see whether revolutionists will succeed in overthrowing them.

Curiously enough these principles did not have the same consistent development in the history of Germany in the Middle Ages. Here we find a fusion of private and public law, which broke its way also into feudal England but never into non-feudal America. Moreover, in German history we find restraints of commerce in plenty and a splitting up of the public power into diminutive commonwealths.

Perhaps Germany therefore required an absolute allegiance to Roman law in order to restore the three Roman foundations of law which were never wanting in America. The consequence of this allegiance was the greatest increase of economic activity, the development of the full economic strength of the people, and a restraint of all unwholesome elements which are to be feared in the struggle of life. Even in Rome, however, these general tendencies of law were not developed in their full strength from the beginning but only by degrees. Therefore the whole history of the process by which the ideas of Roman law were made into a source of the present law must be studied for all three periods. These ideas are European laws, not eternal laws of nature given to all peoples, but a result of historical events, common to, and characteristic of, not only the law of Germany but the law of the greater-European family. We have spoken thus far only of the conservative character of the study of Roman law. But this study bears also a hope for the future.

The more conscious civilized nations become of the common origin of their law, the easier it becomes for them to fall in with the tendency to set up a common law for the world,[9] in which all superfluous differences shall be eliminated. Moreover, the perfectly intelligible movement for international conciliation, which

[9] *Cf.* Zitelmann, Die Möglichkeit eines Weltrechts, Wien, 1888.

seeks to diminish controversies especially among the peoples of a similar culture, cannot be better fostered than by a knowledge of the law which obtains among neighboring nations and its application in international intercourse. The common historical origin of the different systems of law is the master-key to such a mutual understanding. It is as if two brothers, separated in youth from the ancestral home and wholly estranged in different surroundings, on return to their old home are suddenly brought to the recollection of their spiritual kinship through the common memories of childhood. For the civilized European nations the history of Roman law is such an ancestral home, and it must be expounded as such hereafter.

It remains only to add an exposition of the general introduction of Justinian's Institutes by way of example of the method above recommended. I have already pointed out that the Roman authors had a general theory of law which had its value, not merely for their own, but for the law of every people. But this theory was somewhat imperfect and imbued with national ideas which lessened its value for the world in general. Some explanations are to be found at the beginning of Justinian's Institutes which have been taken from other sources than the Institutes of Gaius.[10] In the introduction, the so-called "*proœmium*," in which, according to Byzantine custom, the emperor greeted the new students, there is a characteristic opinion as to the principal end of legal doctrine. Law is regarded as the means of rightly governing (*gubernare*) the commonwealth. This definition really confounds justice and administration, a confusion which arose in the despotism of the later Roman period. But the same definition includes the other idea, that these two forms of public power, which are separated distinctly in America as well as in Germany, are related from a higher point of view, because the one is the supplement of and completes the other, since both increase the common welfare by leading the people along the straight path. That in Justinian's time the contrast between justice and administration had not fallen into oblivion can be seen from the following extracts which we find under the title "*De iustitia et iure*" (Inst. I, 1). The title begins with a sentence which certainly is curious and erroneous if you judge

[10] *Cf.* Zocco-Rosa, Imp. Justiniani Institutionum Palingenesia, Vol. 1, Catania, 1908.

it by the rules of philology: *Ius a iustitia appellatum.* But an opinion which must be rejected by the philologists may possibly be the naïve expression of a philosophical truth. When the text puts justice first, and law as a derivative of justice, it declares that there is an instinct in man which desires law even where it finds none. This desire is not merely moral but also political. It seeks for a certain permanence of human relations. It procures for human beings a pause for rest in the midst of the struggle for existence. Man cannot endure a perpetual unrest. He requires a place where he may rest. But that is only possible where his abode of peace is guaranteed and permanently secured. This desire for enduring conditions of life and therefore for a lasting possession is the very source of law-making. It is the "*constans ac perpetua voluntas suum cuique tribuendi,*" the desire to have a lasting and secure distribution of goods which obtains for all. It follows that the politics of law (*Rechtspolitik*) [11] must be distinguished from everyday politics.[12] The latter is unstable, and continually brings forth new movements. But the former makes possible a gradual peaceful prosperity.

The Romans were specialists for both kinds of politics. But they understood how to distinguish them. They had a true instinct for lasting conditions of life for which the principle of constancy should be maintained, as well as an eagerness for struggling against continual new enemies. In other peoples the one tendency overwhelmed the other. We find the Spartan principle, which treated individuals only as members of the whole; we find other peaceful peoples, who neglected the common welfare by fostering the well-being of the individual. But the Roman citizens possessed the faculty of distinguishing between the essentials of public utility and those of private life, and of securing both by their "*constans ac perpetua voluntas.*" The origin of this faculty lies chiefly in the circumstance that the authority of the house-father was older than the Roman state, an institution of the period of single settlements in the primeval forest, — a condition which calls to mind colonial America. But it may be attributed also to

[11] This is not an easy term to put into English. It means the political aspect of law as distinguished from the general legislative and administrative polity.

[12] *Tagespolitik.* Of course politics is used here in the sense in which we speak of the science of politics.

the constant struggle with the inhabitants of the conquered territory, which calls to mind again colonial America and its Indian wars. Such a situation necessitates strict obedience to the chosen leaders.

No standpoint is too high for the achievement of so difficult a purpose as the "*constans ac perpetua voluntas suum cuique tribuendi.*" Hence Ulpian said, and Justinian repeated, "*Iurisprudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia.*" In this definition we find already in antiquity the idea of a connection between all branches of human culture which is identical with the conception of modern sociology. Justinian adds to this definition the observation, that you cannot achieve so high a goal otherwise than by proceeding from elementary studies to the more complicated details. That is the reason for putting the "Institutes" before the "Pandects." The "*præcepta iuris,*" mentioned in the same title — "*Honeste vivere, neminem lædere, suum cuique tribuere*" — have a general value for all systems of law. These rules are by no means legal commands. For such a purpose they are altogether too abstract. But they are rules for human life, postulated by law, realization whereof the law strives to make possible. They can obtain a concrete content only from the rules of law with which they are connected.

To begin with, the so-called "*honestum*" was distinguished from the "*iustum*" more sharply at Rome than anywhere else. For the Romans created a special "*regimen morum,*" the power of the censor, alongside the power of the consuls and later alongside the jurisdiction which was given to the prætor. By such a distinction of different powers the Roman people were taught to exclude certain social duties from the mechanical operation of the judicial power in order to have them protected by a more arbitrary magistrate. So the rules of decency were distinguished from the rules of law. But nevertheless by calling honesty a "*præceptum iuris*" they acknowledge the close connection between the precept of honesty and the rules of law.[13] Human customs everywhere fit themselves to the law. As a rule whoever follows these customs may be sure of not offending the law even if he ignores the statutes and the other local forms of law. Only in this way can the ordinary

[13] *Cf.* v. Jhering, Der Zweck im Recht, Leipzig, 1883, chap. IX.

man, to whom all the rules are not accessible or intelligible in practice, escape the disagreeable consequences of ignoring the law. Therefore there is also a duty incumbent upon the lawgiver to avoid any commands which cannot be respected by custom or which probably will not be so respected. This idea must be emphasized nowadays as a protest against the tireless engines of modern law-making and the over-zeal of parliaments — something of which you have experience also in America. It is scarcely possible to maintain statutes which continually contend with custom.

After such a determination of the field of jurisprudence and its limitation with respect to the practical consequences of law, the Institutes proceed to a fundamental division of law which is now revived in the jurisprudence of all civilized nations, after having been neglected during the Middle Ages. Ulpian says (I, 1, 4; certainly in accordance with the older philosophers): "*Publicum ius est quod ad statum rei Romanæ spectat, privatum quod ad singulorum utilitatem spectat.*" The commonwealth (*res Romana*) must be supported by special rules of law, without which it could not protect private life. The maintaining rules which support the protecting structure are the *ius publicum;* those which protect are the *ius privatum.* The true aim of Roman law may be stated thus: "Conservation of the commonwealth and free individual private use of the media of existence." Thus the gauntlet is thrown down to both anarchy and communism, and a firm common foundation is laid for the law of all peoples of European culture.

In the second title (Inst. I, 2) the law is divided into three parts: *ius civile, gentium,* and *naturale.* This terminology is of importance for nearly all nations, although these terms have not always had the same significance, since usage has been influenced by historical circumstances which have shaped their meaning in different ways.

In the first place it is not certain whether the contrast of *ius civile* and *ius gentium* obtains generally or is significant to-day. It is clear that the word "civil" in this connection does not mean private law, and that the *ius gentium* was not at all identical with modern international law. *Ius civile* is defined as the law "*quod quisque populus sibi ipse constituit*" and *ius gentium* as the law

"*quod naturalis ratio inter omnes homines constituit.*" It is said that this latter law *apud omnes peræque custoditur* (§ 1, Inst. I, 4). As examples war, captivity, and slavery are mentioned. The last of these examples shows that it has to do with forms of law which were not in effect everywhere, especially since the Romans well knew that there were nations which killed prisoners of war instead of making them slaves (§ 3 Inst. I, 3). Therefore the proposition that the *ius gentium* obtained *apud omnes populos* must be modified to read, *apud fere omnes populos*. To-day we should not find many rules which obtain even among *fere omnes populos*. To enumerate them would be of little interest except in the light of the question whether some exceptional rules of law of barbarian peoples should be tolerated or not. But this is a modern question which does not seem to have had much interest for the Roman.

Another significance attached to the difference between *ius civile* and *ius gentium* in Roman commerce. From of old a special distinction existed in this connection. There were special forms of business transaction from which aliens were excluded, whereas in other departments of life aliens were recognized as *hospites* and *amici*, not indeed as having equal rights with citizens, and yet as associates in certain commercial relations. Evidently this resulted in part from the impossibility of producing at home everything which they required, and partly from the overproduction of other things which, therefore, they desired to export. Some articles of commerce, therefore, were subjected to certain strict forms of contract, which were forbidden to aliens, and in consequence import and export of such articles — for example, beasts of burden — were practically prohibited. But other property — for example, grain — could be sold by contracts which were allowed also to those aliens who belonged to peoples not entirely without law. Therefore a *ius gentium* existed for commerce between citizens of different peoples, the rules whereof obtained among nearly all peoples not only from past time but through the influence of later development. This body of law was acknowledged at Rome for every people to whom the protection of Roman tribunals was conceded — as well aliens as citizens. It was distinguished from the law whose application was restricted to citizens alone. Its scope was greatly extended, but the contrast of *ius gentium* and

ius civile never wholly disappeared. Such an extension of the *ius gentium* went on also through the Middle Ages and continues even yet in the modern world. Therefore America and Germany alike have come to the conclusion that on principle aliens have no less right in matters of private law than citizens. Only exceptionally are aliens treated as such in these matters. Since the old Roman systematic distinction between the two parts of law was not worth while, the Roman signification of *ius gentium* was forgotten and the term came often to be used to signify the legal relations of one nation to another, *i. e.*, international law, although this does not extend as far as the Roman *ius gentium* and has a different significance.

There has been much dispute also about the *ius naturale* which is discussed in this title. If we read our title carefully, we shall find that two different subjects are referred to, both of which are called natural law. That may have resulted from the way in which the work was composed, for it is a compilation from different originals from which extracts were incorporated. It is first said in the text that there exists a *ius naturale, quod natura omnia animalia docuit*, that is to say, a zoölogical natural law. Later we are told of another natural law which belongs only to human beings. The first-mentioned natural law cannot be regarded as law. It has no interest for judges who are not obliged to give judgments for animals. Therefore the word *ius* does not mean here a real law, but only that human law is dependent upon the physical laws which even now we call laws of nature. An example of law in this sense is the sexual relation, which is called matrimony for human beings only when it is approved by human law. Another example is the begetting and educating of offspring, which also can be seen among many kinds of animals in different forms and degrees. Following this point of view it would also have been possible to mention the satisfaction of hunger and the desire to sleep and to be protected against the rigors of the weather. This conception of natural instincts as the occasion of law-making has no direct practical importance either for the administration or the science of law. But perhaps it was wise in the Roman author to advise the lawgiver not to awaken the brute man by overlooking his natural desires. Perhaps, also, the other sentence contained in our title pertains only to the physical laws of nature, namely,

the assertion that *naturalia iura quæ apud omnes gentes peræque servantur, divina quadam providentia constituta semper firma atque immutabilia permanent* (Inst. I, 2, 11). We cannot believe that the Roman, who knew many nations so well, believed that the same actual law could exist for all time for all different nations. Perhaps that might be true of certain rules, the result of history, which, to be sure, seem to have an immutable character and which it is hoped will never disappear, such as, for instance, the principle of human monogamy.

But in addition to the facts of nature upon which humanity is eternally dependent the name of natural law is also applied to certain rules of law, which correspond to nature, but in spite of this are not actually observed everywhere, but are corrupted by unnatural statutes. This is what is meant by the distinction between the so-called positive and the natural law. The Institutes give as an example the law of slavery, which existed everywhere in antiquity as an institution of the *ius gentium*, although it seemed in conflict with a certain *ius naturale*.

No doubt, instead of saying that slavery did not exist in a state of nature in which the prisoners of war were all killed instead of being enslaved,[14] it should be said that we have here the dawning of an ideal of future abolition of slavery which was already recognized by the Romans. At any rate the *ius gentium* is distinguished from the *ius naturale* with respect to slavery, whereas in another connection these two types of law are identical (Inst. II, 1, 40), since those rules which obtain among many peoples seem to be more natural than the special creations of a few nations. In this sense "natural" is not an epithet of criticism for the undeveloped, but a term of approval for the law adapted to its end, or, as Stammler puts it, "*das richtige Recht.*" [15]

A distinction between the law which actually obtains and the law worthy of approval which ought to obtain cannot be overlooked by the critical sense of a people even to-day. It is true the standards of what is worthy of approval are diverse and often rest only upon personal preference. But it has often happened, and still happens, that a considerable body of the people, especially powerful political parties, disapprove certain rules of law, such as, for in-

[14] *Cf.* "*ab initio*" in Inst. II, 1, 2.

[15] Stammler, Die Lehre von dem richtigen Rechte. Berlin, Guttentag, 1902.

stance, cruel forms of capital punishment, so strongly that their disapproval cannot be overlooked by jurisprudence and must be recognized alongside of the actual law. The fanatical limitation of theory of law to what actually obtains, blinding oneself to contrary currents of popular thought, cannot be approved. Hence there is no justification for the undue invective which, since its alleged overthrow by the historical school, is directed against a theory which would recognize the contrast between the law which obtains and the law which many desire. In this connection the idea of natural law has an enduring value.

There follows in Justinian's Institutes another division into the written law and the unwritten law (*ius scriptum* and *ius non scriptum*) (Inst. II, 2, 3). These forms are spoken of as a peculiarity of Greek and Roman law, but they exist also in England, America, Germany, and other countries. However, it would be better to-day to use the term "printed law" instead of "written law."

But the following division of the law into *leges, plebiscita, senatus consulta, principum placita, magistratuum edicta, responsa prudentium*, cannot be maintained for modern commonwealths, especially in the case of America and Germany, in the strict Roman sense. This enumeration was correct even in Justinian's time. The power of legislation was then in the hands of the emperor, whose general commands were called "*leges*." The other names for the forms of written law are mentioned by Justinian only in order to explain better the contents of his compilation of the older law, in which these old terms occur many times. Only for such a purpose could the old distinction of *lex* and *plebiscitum*, abolished long ago, when both forms of the ancient assemblies of the Roman people disappeared, be worth mentioning. These ancient assemblies were gatherings of all the citizens, not assemblies of deputies or representatives, as in modern legislatures. Therefore they became too difficult to handle when the old city-state changed to a commonwealth extending over the large territory of Italy. Thus it happened that other ordinances, which formerly existed beside the laws of the people and dependent upon them, came into the first line as true sources of law. So the *senatus consulta*, the resolutions of the Roman senate; the edicts of the magistrates, which introduced the famous dualism of the *ius civile* and *ius honorarium*, a

dualism lost by the mingling of the two in the later law of the Byzantine Empire; the *responsa prudentium*, opinions of learned teachers and expounders of the law; all came at last to be regarded by Roman practice as true laws.

But all these sources of law were superseded by the commands of the emperors in the period of absolutism, not only in the Roman empire, but in all commonwealths in which an absolute government grew up. This form of government has been weakened nowadays almost everywhere by constitutionalism. In America it never existed, because even in the old royal times the English law was constitutional.

As to the unwritten law customary law alone is mentioned by Justinian's Institutes. This source of law has by no means had the same influence everywhere and in all times. The common law of England and America certainly belongs here. But there is a controversy as to whether the great value attached to precedents in English and American practice must be regarded as constituting a customary law.[16] I do not believe it does. Precedents govern subsequent decisions by their mere authority, not because they have been sanctioned by a long course of observance. On the other hand they may be overruled by a later decision of itself, without waiting for a long course of observance to give the overruling case the authority of a new law.[17] This weight of authority given to former decisions seems to me to be a consequence of the need for a well-defined law which shall be as certain as possible. This natural need was met sufficiently for the Roman people and the nations of continental Europe by the different forms of written law. For England precedents served the same purpose. The authority attributed to a judicial decision for the future must not be confounded with its authority in the case to which it is given. Roman terminology calls this function of a decision a *ius* (*res iudicata ius facit inter partes*), because a decision binds the parties

[16] *Cf.* the preface to the translation of O. W. Holmes, The Common Law, by R. Leonhard, Leipzig, Duncker & Humblot, 1912, p. iii.

[17] *Cf.* Schmitt-Falkenberg, Eine Studie ueber das Verlöbnis in England, Breslauer Dissertation, 1911, p. 10 ff. [It should be explained in this connection that Professor Leonhard is contrasting the Anglo-American doctrine of precedents with the continental doctrine of *usus fori* or *Gerichtsgebrauch*. According to the latter doctrine single decisions have no binding force as precedents, but a long-continued course of decision is regarded as having the force of law. — ED.]

and really makes a new law in those cases where the judge may create, in accordance with his free discretion, a new obligation *ex fide bona*, a new idea which is drawn neither from the words of a rule of law nor from the examples of a prior usage. Such an absolutely free discretion was rejected as a matter of principle by Justinian (Inst. IV, 17, pr. *ne aliter iudicet, quam legibus aut constitutionibus aut moribus proditum est*). But this certainly had no practical effect, because no tribunals can exist without such discretion. In England and America, where there is no complete codification, this judicial "creative power," as we are wont to call it of late, has flourished exceedingly.

If we look at the poverty of general doctrines contained in Justinian's Institutes we may easily underrate the worth of Justinian's legislation for posterity. This treasury of ideas which became common to the circle of European civilization, and the manner in which a common juridical thought became an inner bond for all European culture, can only be set forth in lectures upon the whole system of law, as I tried to expound it in New York. The only purpose of the foregoing sketch is to show the method in which that is to be done, and to give an example of the mode of treatment by applying it to the general doctrines of law.

In conclusion, let me repeat, by way of summary, the main points of what has gone before. Roman law has a value for all nations, for two reasons. In the first place, the Roman jurists worked out a technical method of applying law which has furnished models for every other law, even for wholly different legal systems. Secondly, Rome developed certain fundamental principles of private law which are characteristic of the special civilization of Europe. For both reasons America above all other nations has a vocation to foster Roman jurisprudence. First, because there is in America an excellent national technique of jurisprudence which may be compared with the Roman counterpart in order to shape an ideal theory of a perfect exercise of the art of judicial decision of civil causes. Secondly, because the United States is the only country in which the different national cultures of Europe have been united in a new culture. Moreover, Munroe Smith has shown clearly that there are many legal analogies between ancient Rome and the United States arising from their common republican con-

stitution.[18] Therefore the duty of commenting upon and expounding the common interests and the common ideas of right and law of the greater-European civilization has devolved primarily upon New Europe.

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[18] Columbia Law Review, 1904, p. 523 ff. Translated by R. Leonhard in Stimmen des Auslands usw., Breslau, 1906.